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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 649

M. RAYMOND ADLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, M. Raymond Adler prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 27, 1967.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is set forth as Appendix A, hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 27, 1967. On August 23, 1967, Mr. Justice John M. Harlan, Associate Justice and Circuit Justice for the Second Circuit, entered an order extending the time of peti-

tioner for filing the petition for writ of certiorari herein until September 26, 1967. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

1. Whether petitioner's allegedly false statement to an agent of the Federal Bureau of Investigation, whereby he attempted to initiate a complaint with said bureau, constituted a false statement in a "matter within the jurisdiction of any department or agency of the United States", in violation of Title 18, United States Code, §1001. The Court of Appeals for the Second Circuit in this case held such statement to be violation of said criminal statute, whereas the Court of Appeals for the Eighth Circuit in the case of *Friedman* v. *United States,* 374 F. 2d 363 (1967), held that a similar statement was not within the statute.

2. Whether the oral statement of complaint allegedly made by petitioner to an F.B.I. agent was, in the circumstances of this case, a criminally false statement, or whether it constituted merely a seeking of information or a preliminary inquiry prior to the making of a formal complaint; and whether in the making of said statement there was any proof of criminal intent on the part of petitioner.

3. Whether, under the circumstances of this case, the proof of the falsity of petitioner's oral complaint, consisting of his latter admission to another F.B.I. agent that said original oral complaint was false, was obtained from him in express violation of his constitutional right to counsel, especially after the government had been notified by petitioner's counsel that it did not want him to be interrogated with respect to this matter in the absence of counsel.

Statutory Provision

Title 18, United States Code

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statement of the Case

The Indictment

Petitioner was indicted in the United States District Court for the Southern District of New York (Docket No. 66 Cr. 528) of the following charge:

"The Grand Jury charges:

On or about the 26th day of July, 1963, in the Southern District of New York, M. Raymond Adler, the defendant, in a matter within the jurisdiction of a department and agency of the United States, to wit, the Federal Bureau of Investigation, United States Department of Justice, unlawfully, wilfully and knowingly did make false, fictitious and fraudulent statements and representations, namely, that while he was engaged in the performance of a construction con-

tract for the United States, public officials corruptly exacted money and other things of value from him in return for being influenced in their performance of official acts in connection with the said contract, whereas in truth and in fact, as the defendant then and there well knew, no money or other thing of value had been so exacted by any public official.

(Title 18, United States Code, Section 1001)"

The Record

The record in this case consists of the original record of proceedings in the District Court and a photo-copied appendix filed by petitioner in the Court of Appeals. The government also filed a printed appendix which merely duplicated in part portions of petitioner's appendix. Petitioner's appendix contained all of the proceedings of the District Court.

District Court Proceedings

Petitioner was tried before Honorable Edward C. McLean, United States District Judge, having waived trial by jury. At the conclusion of the trial Judge McLean dictated an oral decision into the record in which he found the petitioner guilty as charged. Said oral decision is reprinted as Appendix B, *infra*.

Thereupon, petitioner was sentenced to pay a fine of $2,500, which fine has been paid.

The Facts

On July 26, 1963 (the date of the crime alleged in the indictment), petitioner M. Raymond Adler appeared at the New York office of the Federal Bureau of Investigation, where he was directed to Special Agent Martin Weinberg. According to Mr. Weinberg's testimony the following transpired:

> "A. Yes. Mr. Adler came into the office and I was assigned to speak with him and he told me that he was there on behalf of a friend, and that this friend had a construction contract at a Government installation and in the course of the completion of this construction contract the friend was required to pay bribes to various Government officials.
>
> Mr. Adler stated that he hoped the FBI would do nothing more than reprimand the Government officials involved so that this bribery would stop.
>
> At that point I asked Mr. Adler directly whether in fact there was a friend, or was he talking about himself, to which he replied that he was talking about himself.
>
> At that point I indicated to Mr. Adler that he need make no further statements, that anything he did say could be used against him, and that he was entitled to the services of counsel before continuing.
>
> He stated that he did not wish to make any other statements at that time but indicated that if he were questioned by any other party regarding bribery he would deny it. He also indicated that he would be in his office at 420 Lexington Avenue on the following Monday morning.

Q. Was anything further said by you or by him? A. At the time I think I mentioned to him that if there was an allegation of bribery we would in the FBI not stop at just reprimanding someone, but look to see if there was substantiation of the bribery allegation for submission to the proper authorities.

Q. And that is all that was said? A. At that first meeting, yes.

Q. Did you ever meet Mr. Adler again? A. Yes, I met him the following Monday morning, which would be July 29, 1963, at his office. I again reminded him that he had the right to services of counsel, that he need make no statements, and if he did they could possibly be used against him.

He stated at that time that he had not spoken to his attorney and therefore did not wish to discuss anything further. However, at the time he did state that he felt it would be unfair to both him and his company to talk any further because contracts were in an early stage and that if he were questioned by either the grand jury or by any other agents as to bribery he would again deny it.

At that point I left his office." (App. App. 5-7)[1]

At both of these meetings the only persons present were Agent Weinberg and petitioner.

Thereafter petitioner received a grand jury subpoena to appear before a Federal grand jury in the Southern District of New York on November 7, 1963 (App. App. 96-97; Def't Exh. A). Following his receipt of said subpoena

[1] All numbers in parentheses refer to pages in Appellant's Appendix filed in the Court of Appeals and in this Court.

petitioner retained counsel to represent him in this matter. He was represented by a former assistant United States attorney in the grand jury proceedings and in appearances before the office of the United States Attorney for the Southern District of New York (App. App. 95). His attorney discussed this case with various attorneys in the United States Attorney's office. On November 27, 1963, he notified the assistant United States attorney in charge of this case that he was advising the petitioner that he should claim his privilege against self-incrimination when he appeared before the grand jury and that he did not wish him to be further questioned by any authorities on the matter. On December 5, 1963, petitioner appeared before the grand jury, where he claimed his privilege against self-incrimination and refused to answer any questions. At no time after December 5, 1963, did any government agent or official ever communicate with counsel to seek permission to interview petitioner, nor did any government agent or official advise counsel that petitioner would be interviewed or questioned thereafter (App. App. 98-100).

Notwithstanding counsel's statement, nevertheless on February 25, 1965, petitioner was interviewed by another F.B.I. agent. Said agent testified that he knew that counsel was representing petitioner and that said counsel stated he did not wish petitioner to be interviewed in the absence of counsel. This agent testified that he had reviewed the F.B.I. file in this matter before coming to petitioner's office on February 25, 1965, and that in spite of his knowledge of the background facts of this case he did question petitioner about it. A careful reading of this agent's testimony (App. App. 112-125) discloses very clearly that the agent led petitioner to believe that only a written state-

ment or a statement under oath could be used against him, but that an oral statement made in the course of an informal discussion between the agent and petitioner could not be so used. It was during the course of said interview that petitioner ostensibly stated that his original "complaint" was false. Apparently, this statement was made prior to the agent's warning to appellant as to his constitutional right of silence and the agent's clear statement to the effect that only a written statement or a statement under oath could be used against him.

The sole proof of the falsity of the alleged original statement made by petitioner on July 26, 1963, was his subsequent "admission" on February 25, 1965, that said original statement was false.

Reasons for Granting the Writ

The clear and expressed conflict between the Courts of Appeals for the Second and Eighth Circuits, as to the scope and applicability of Title 18, United States Code, §1001, to the allegedly false initiation of complaints to law enforcement agencies, requires resolution by this Court. See Rule 19 1(b), Revised Rules of the Supreme Court, effective October 2, 1967. The meaning, purpose and construction of this criminal statute also requires definitive interpretation and decision by this Court.

1. Petitioner's allegedly false statement to an agent of the F.B.I., whereby he attempted to initiate a complaint with said bureau, did not constitute a false statement in a "matter within the jurisdiction of any department or agency of the United States", in violation of 18 U. S. C. §1001.

The holding of the Court of Appeals for the Second Circuit in this case that any such statement is a violation of this criminal statute, is in direct and expressed conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Friedman* v. *United States,* 374 F. 2d 363 (1967), holding that a similar complaint statement to the F.B.I. was not within the intention, meaning and scope of this statute, and hence not a criminal violation of law.

Apart from petitioner's showing that he did *not* make any alleged false statement,[2] it is his contention that at the time and place set forth in the indictment there was not then any matter pending "within the jurisdiction of any department or agency of the United States". The opinion of Circuit Judge Floyd R. Gibson in the *Friedman* case, *supra,* supports this view in an opinion containing an analysis of the principal cases on this subject, showing the historical and legislative background of the statute, the purposes for which it was revised in 1934, and its present construction. The conclusion is clearly reached that the making of a false statement to an investigative agency, having no rule-making or adjudicative power or jurisdiction over the matters in issue, does not constitute a violation of this statute. *United States* v. *Bramblett,* 348 U. S. 503 (1955); *United States* v. *Gilliland,* 312 U. S. 86 (1941); *United States* v. *Stark,* 131 F. Supp. 190 (D. C. Md., 1955, opinion by Chesnut, *D.J.*). See, e.g., *Gonzales* v. *United States,* 286 F. 2d 118 (10th Cir., 1960); *Carroll Vocational*

[2] Petitioner urges that Agent Weinberg's testimony shows that all petitioner did was to attempt to initiate a complaint of shakedowns and that when Agent Weinberg advised him of his rights, he refrained from making any further statement. A giver of bribes is equally as culpable as a seeker of bribes. See 18 U. S. C. §§201, 203.

Institute v. *United States*, 211 F. 2d 539, 540 (5th Cir., 1954).[3]

As to cases concerning the furnishing of false information to investigative agencies such as the F.B.I., every reported case, except this one and *United States* v. *Van Valkenburg*, 157 F. Supp. 599 (D. C. Alaska 1958), has held that the alleged false statements were not made "in any matter within the jurisdiction of any department or agency of the United States". In addition to the *Friedman* case, *supra*, these include *Paternostro* v. *United States*, 311 F. 2d 298 (5th Cir., 1962); *United States* v. *Levin*, 133 F. Supp. 88 (D. C. Colo., 1953, opinion by Circuit Judge Pickett); *United States* v. *Stark*, *supra*; *United States* v. *Davey*, 155 F. Supp. 175 (D. C. S. D. N. Y., 1957); *United States* v. *Philippe*, 173 F. Supp. 582 (D. C. S. D. N. Y., 1959).

The Court of Appeals in this case attempts to distinguish the so-called "exculpatory no" cases from among those cited, as not falling within the statute's coverage without any reasoned analysis justifying such distinction. The court attempts to justify this prosecution as being within the coverage of the statute, stating that petitioner "made an affirmative voluntary statement deliberately intended to provoke agency action" (Appendix A, *infra*). Apart from petitioner's argument that he did not have any such intention, and that he attempted to withdraw his pre-

[3] The cases principally relied on by the Court of Appeals and the District Court herein (Appendix A and B, *infra*) are *Brandow* v. *United States*, 268 F. 2d 559 (9th Cir., 1959) and *United States* v. *McCue*, 301 F. 2d 452 (2nd Cir., 1962), cert. den. 370 U. S. 939 (1962). As Circuit Judge Gibson points out in his classification of cases on this subject, both of these cases related to false statements made while the defendants were "resisting * * * monetary claims by the United States by presentation of false information" (374 F. 2d 363, 368).

liminary inquiry within the first minute of his interview with Agent Weinberg, he argues further that in no event is the submission of a complaint to the F.B.I., or other federal law enforcement agency, actionable as criminal within the meaning, scope and intention of this statute.

In light of the conflict among the circuits over this question, and its importance in the future administration of this statute, it is submitted that certiorari should be granted to review this case.

2. The oral statement of complaint allegedly made by petitioner to an F.B.I. agent was, in the circumstances of this case, not a criminally false statement. In substance it constituted merely a seeking of information or a preliminary inquiry prior to the making of a formal complaint. In any event, in making said statement there was no proof that petitioner had a criminal intent. The testimony of F.B.I. Agent Weinberg, reprinted *supra,* discloses that after petitioner's hypothetical inquiry concerning a purported "friend" being shaken down for bribes, and the agent's pointed questioning statement to petitioner that he was really talking about himself, the agent warned petitioner of his constitutional rights to the effect that any statement he made could be used against him. This was proper, especially in light of the fact that any person stating that they were giving bribes could be punished therefor (18 U. S. C. §201). When the agent warned petitioner *after* his initial inquiring statement, the one alleged in the indictment to be the false statement, that whatever statement he made could be used against him, petitioner then decided not to go forward with his proposed complaint. This is all the more evident from the fact that petitioner's

inability or failure to establish his proposed complaint could lead to his prosecution for making a false statement. In the *Friedman* case, *supra,* several long and detailed written statements were furnished by the defendant, acting with his attorney, to the F.B.I. Upon concluding that said complaint was false, Friedman was prosecuted under 18 U. S. C. §1001.

Thus it is clear that petitioner's statement to the F.B.I. agent did not reach the status of a false, fictitious or fraudulent statement or representation "in a matter within the jurisdiction of an agency of the United States". Since petitioner was only attempting to initiate a proceeding or matter with the F.B.I., it was necessary that his statement be complete and full in order to invest that agency with jurisdiction[4] over the matter sought to be presented to it. The degree of completeness required for this purpose would necessarily depend upon the nature and extent of the complaint statement. Here petitioner's statement never proceeded beyond the most preliminary words. The allegations of the indictment were not based upon petitioner's statement, but rather upon subsequent investigation conducted by the F.B.I.

Apart from petitioner's subsequent "admission" that his original "statement" was false, there is absolutely no evidence that it was in fact a false statement. At best petitioner went to the F.B.I. to seek information or to file a complaint. His naivete as to how the F.B.I. operates in these matters was soon shattered by the warning given to him by the Agent Weinberg that whatever he said could

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[4] This assumes *arguendo* that such matters can be within the "jurisdiction" of an investigative agency such as the F.B.I., a legal conclusion with which petitioner disagrees in this petition.

be used against him. Petitioner suddenly realized that by making a complaint of the character involved herein, or even seeking information from the F.B.I., could result in criminal charges against him. At that moment he stopped. He never repeated or even completed his proposed statement.

Furthermore, in attempting to make his statement petitioner was not acting with criminal intent, an essential ingredient required in a violation of the statutes involved herein, *Morissette* v. *United States,* 342 U. S. 246 (1952); *Hughes* v. *United States,* 338 F. 2d 651, 652 (1st Cir., 1964).

3. The proof of the falsity of petitioner's oral complaint, consisting of his later admission to another F.B.I. agent that the original oral complaint was false, was obtained from him in express violation of his constitutional right to counsel, especially after the government had been notified by petitioner's counsel that it did not want him to be interrogated with respect to this matter in the absence of counsel. The record of this case discloses that after petitioner's "attempt" to withdraw his preliminary oral statement, the F.B.I. would not let go. They conducted a full scale investigation into petitioner's background, sent agents to attempt to get petitioner to complete his statement, had him subpoenaed before the grand jury, and then waited for two and a half years, while the case "cooled" off, before sending another agent into his office to question him about the matter. This second agent knew from his file that petitioner was represented by counsel who expressed petitioner's desire not to be interviewed further about this matter, especially in his absence. Nevertheless, in complete disregard and derogation of petitioner's right to coun-

sel, and on the basis of a clear misrepresentation that only a statement in writing or sworn statement could be the basis of charges against petitioner, this second agent proceeded to have an "informal chat" with petitioner, during which he ascertained that petitioner's original "statement" on July 26, 1963 was "false".

This Court has held in recent years that custodial interrogations of defendants without warning of Fifth Amendment rights constitute violation of that amendment and of an accused person's right to the effective assistance of counsel under the Sixth Amendment, *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). This Court has also held that the surreptitious interrogation of an indicted defendant also constitutes a violation of a defendant's right to counsel and privilege against self-incrimination, *Massiah* v. *United States*, 377 U. S. 201 (1964). Several courts have refused to apply these doctrines to non-custodial and non-indicted suspects, although such distinction appears to be without a difference at the heart of these cases. Since the second F.B.I. agent in this case had express knowledge that petitioner was represented by counsel and that he was not to be interviewed in the absence of such counsel, his going to petitioner's office was upon a pretext of checking his records.[5] His actual purpose was to obtain an incriminating statement in the absence of counsel. An examination of the transcript of trial herein clearly reveals that this was the sole purpose of the agent's final interview with petitioner.

[5] There was nothing about petitioner's records which required checking.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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September 20, 1967